

No. 14557

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COLONIAL TRUST COMPANY,

Appellant,

vs.

GEORGE GOGGIN, Trustee in Bankruptcy of the Estate of
Intercontinental Airways, Inc.,

Appellee.

CLOSING BRIEF OF APPELLANT.

DAN BRENNAN, OF
OVERTON, LYMAN, PRINCE & VERMILLE,

727 West Seventh Street,
Los Angeles 17, California,

Attorneys for Appellant.

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General Statement.

With but few minor exceptions the appellant's position with reference to the points discussed in the appellee's brief has been presented in the Opening Brief of Appellant. The appellant will therefore reply only to those points specifically stressed by the appellee.

Answer to Appellee's "Argument."

In support of the judgment appealed from the appellee relies on a few general remarks concerning the equitable jurisdiction of the bankruptcy courts with a passing reference to the "clean hands" doctrine and to the principle that equitable liens are favored. The appellee makes no attempt to show why the law cited in the Opening Brief of Appellant should not control in this instance. The law of the case is summarily disposed by a remark that appellant is "contending for a narrow enforcement of legal rights alone."

In support of its "clean hands" argument appellee suggests that the appellant was not prepared to pay the claim asserted. This is not the test and it ignores the fact that it is the appellee who asserts a so-called "equitable" claim. Under Section 70 of the Bankruptcy Act, 11 U. S. C. A. 110, the trustee did not acquire any right in the involved aircraft which was not transferable by the bankrupt or leviable at law or subject to sequestration. The bankrupt's right must be measured by state law. (*Adelman v. Centaur Corporation* (C. C. A. 6), 145 F. 2d 573.) The equitable powers of the District Court are not the measure of the bankrupt's interest.

In each of the California cases cited by the appellee in support of its contention that equitable liens are favored, it will be noted that there was a contract between the property owner and the lien claimant. By virtue of the contract the property owner was in each instance personally indebted to the lien claimant and had agreed that the property in question should be subjected to that debt. The appellant in this instance was not personally indebted to the bankrupt, had not agreed that its property would be available for the payment of the bankrupt's claim. In short, there was no contractual relationship whatsoever between the appellant and the bankrupt.

In reply to appellee's comment that the appellant "brazenly seeks the delivery of the aircraft" without conceding liability for more than the statutory lien, we call the Court's attention to the rule set forth in Pomeroy's Equity Jurisprudence, 5th Ed., Vol. 4, p. 715 to wit:

"* * * if a person lays out money on another's property with knowledge or notice of the true state of the title * * * he has no claim to be reimbursed and, of course, no lien." (Cases cited.)

In *Rosenberg v. Lawrence* (1938), 10 Cal. 2d 590, at 594-595, it was declared that:

“While a court of equity may exercise broad powers in applying equitable remedies, it may not create new substantive rights under the guise of doing equity.”

When leasing its aircraft, the appellant was assured by the substantive law that without its consent its aircraft could not be subjected to repair liens in excess of rather nominal amounts. Not having consented to the imposition of liens in excess of these statutory amounts, the appellant's proprietary rights should not be divested by the technique of a loose application of otherwise salutary concepts. When the debtor corporation performed the work for which it seeks payment, it knew that under the substantive law it must look to the companies or persons with whom it had contracted. It knew specifically that the aircraft was subject only to a rather nominal statutory lien in the absence of “written consent” of the appellant. The debtor did not solicit appellant's consent much less obtain it. The appellee is hardly therefore in a position to urge now that the appellant is “brazen”, or has “unclean hands”, or is asserting “unconscionable rights”.

Conclusion.

The decision appealed from constitutes a substantial and material rewrite of the lien law of the State of California and should be reversed.

Respectfully submitted,
DAN BRENNAN, of
OVERTON, LYMAN, PRINCE & VERMILLE,
Attorneys for Appellant.

